

MALAYSIAN REPORTS

B.A. RAO & ORS. v. SAPURAN KAUR & ANOR.

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Raja Azlan Shah F.JJ.) February 13 and May 18, 1978]
[Ipoh — Federal Court Civil Appeal No. 104 of 1977]

Evidence — Report and notes of evidence of Committee of Enquiry held into death of patient in hospital — Whether unpublished official records relating to affairs of State — Action for negligence on behalf of estate of deceased — Whether documents privileged from disclosure — Evidence Act, 1950, ss. 123 and 162.

Administrative Law — Action against Government for negligence leading to death of patient — Reports and documents relating to Committee of Enquiry held into death of patient — Whether unpublished official documents relating to affairs of State — Whether documents privileged from disclosure — Evidence Act, 1950, ss. 123 and 162.

In this case the respondents had claimed damages on behalf of the estate of the deceased for his death as a result of the negligence of the medical officers of the district hospitals. A Committee of Enquiry had been held into the death of the deceased and the respondents had issued a notice to produce the reports and findings of the Committee of Enquiry. The appellants objected on the ground that the notes and findings of the Committee of Enquiry were unpublished official records and therefore privileged from disclosure under section 123 of the Evidence Act. The learned trial judge, after scrutinising the affidavit of the Deputy Secretary General of the Ministry of Health objecting to the production, disallowed the objection and ordered production of the reports and findings of the Committee. The appellants appealed.

Held, dismissing the appeal: (1) objection as to production and the question of admissibility under sections 123 and 162 of the Evidence Act should be decided by the court in an enquiry of all available evidence. It was for the court, not the executive, ultimately to determine that there was a real basis for the claim that "affairs of State is involved" before it could permit non-disclosure;

(2) a mere assertion of confidentiality and that affairs of State were involved without evidence in support, could not shut out relevant evidence;

(3) in this case the documents in question were not unpublished documents relating to affairs of State and consequently where the Government or the doctor was sued for negligence the Government could not screen the alleged wrongful act from the purview of the court on the ground that it was an affair of State demanding protection;

(4) in the administration of justice nothing was of higher importance than that all relevant evidence should be admissible and should be heard by the tribunal that was charged with deciding according to the truth.

Cases referred to:-

- (1) *Conway v. Rimmer* [1968] 2 A.C. 910.
- (1a) *R. v. Lewes Justices* [1973] A.C. 388.
- (2) *Duncan v. Cammell, Laird and Co. Ltd.* [1942] A.C. 624.
- (3) *Ellis v. Home Office* [1953] 2 Q.B. 135.
- (4) *United States v. Reynolds* (1953) 35 U.S. 1.
- (5) *New York Times Co. v. United States* (1971) 403 U.S. 713.
- (6) *Robinson v. South Australia (No. 2)* [1931] A.C. 704.
- (7) *Bruce v. Waldron* [1963] V.R. 3.
- (8) *Ex parte Brown, Re Tunstall* (1966) 67 S.R. (N.S.W.) 1.
- (9) *Corbett v. Social Security Commission* [1962] N.Z.L.R. 878.
- (10) *Union of India v. Sodhi Sukhdev Singh* A.I.R. 1961 S.C. 493.
- (11) *Niranjan Dass v. State of Punjab* A.I.R. 1968 Punjab & Haryana 255.
- (12) *State of Uttar Pradesh v. Raj Narain* A.I.R. 1975 S.C. 865.
- (13) *D. v. National Society for the Prevention of Cruelty to Children* [1977] 1 All E.R. 589.

A (14) *Glasgow Corporation v. Central Land Board* [1956] S.C. 1.

FEDERAL COURT.

Fong Seng Yee (Senior Federal Counsel) for the appellants.

M. Sivalingam for the respondents.

B In the court below (Raub — Civil Suit No. 10 of 1974) (*M. Sivalingam* for the plaintiffs and *Lim Beng Choon*, Senior Federal Counsel, for the defendants) the following judgment was delivered on May 4, 1977:

Mohamed Zahir J.: In the course of trial of the above suit, the plaintiffs sought the production of certain documents under Notice to Produce Documents including all notes and findings of the Committee of Enquiry set up by the Ministry of Health to inquire into the death of the deceased abovenamed* held at the Hospital Daerah, Mentakab, on June 1, 1973. The defendants did not object to the production of other documents listed under the Notice except for these documents.

D The defence counsel objected to the production of the notes of the Committee of Enquiry and claimed privilege under section 123 of the Evidence Act. He filed an affidavit sworn by the Deputy Secretary-General of the Ministry of Health claiming such privilege. In paragraph 3 of the affidavit the Deputy Secretary-General stated the purpose of the inquiry was to investigate into matters relating to medical facilities and services and hospital administration existing in the Hospital Daerah, Mentakab in 1973 with a view to make such comments and recommendations as the said Committee deemed fit to enable the Ministry to carry out its policy of promoting greater efficiency in hospital administration and the provision of medical services not only in respect of the Hospital Daerah, Mentakab but also in respect of all hospitals throughout the country.

F Clause 4 of the affidavit states that the documents comprise of a report dated October 3, 1973 and notes of evidence containing statements of facts, remarks, opinions and recommendations of witnesses and members of the said Committee, all given in strict confidence to the Ministry.

Under paragraph 5 of the affidavit, the defendants in seeking privilege under section 123 of the Evidence Act set out two reasons:

- H (a) that disclosure will be detrimental to public interest as the notes were compiled and furnished for the guidance of the Ministry and in policy making relating to medical services and hospital administration.
- I (b) that disclosure will be prejudicial to the public service in that the maintenance of secrecy of such documents is necessary for the proper function of departmental inquiries.

Section 123 of the Evidence Act reads as follows:—

"No one shall be permitted to produce any unpublished official records relating to affairs of State, or to given any evidence derived therefrom, except with the permission of

* Siminder Singh s/o Lall Singh.

the officer at the head of the department concerned, who shall give or withhold permission as he thinks fit, subject, however, to the control of a Minister in the case of a department of the Federal Government, and of the Chief Minister in the case of a department of a State Government."

The law on this aspect as it appears to me is that it is for the court to decide that the document in question relates to any affairs of State, and if the court so decides, it will then be for the departmental head to decide whether disclosure of its contents will be against public interest and his decision on the point is conclusive (see *Sarkar on Evidence*, 12th Ed. p. 1162).

It appears to me that there is a difference of approach in deciding this issue in our country from that in England where it is provided that evidence of the following matters is excluded on grounds of public policy:

- (i) Affairs of State;
- (ii) Information given for the detection of crime; and
- (iii) Judicial disclosures.

There, it would appear that in deciding whether a claim of Crown privilege should apply to a document, two kinds of public interest are to be considered by the court. These are:

- (i) the public interest that harm shall not be done to the nation or the public service; and
- (ii) the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.

(see *Phipson on Evidence*, 11th Ed. p. 240).*

In our country the law applicable is section 123 of the Evidence Act. "Affairs of State" is not defined by the Act. There is another fundamental difference in the mode of interpreting whether any document is relating to affairs of State or not, that is in England as decided by *Conway v. Rimmer & Anor.*,⁽¹⁾ the court can order production of the document for inspection and decide after such inspection the status of the document but in our country the court is prohibited from doing so by virtue of section 162 which reads as follows:—

"(1) A witness summoned to produce a document shall, if it is in his possession or power, bring it to court notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the court.

(2) The court, if it sees fit, may inspect the document unless it refers to affairs of State, or take other evidence to enable it to determine on its admissibility."

Counsel for the defendants submitted that the court will not interfere once the executive claims privilege in the exercise of its prerogative to prevent disclosure of documents and he refers to the *Conway's* case and *Reg. v. Lewes JJ.*^(1a) He submitted further that the enquiry was a departmental enquiry and no one was bound to give information to the Committee and it was not a mere enquiry on the death of the deceased but admitted that the death of the deceased was the cause of the enquiry to be set up. The counsel submitted that not all enquiries are privileged but when it relates to policy making and confidentiality, it is privileged.

* See also 12th Edn. p. 231.

Conway v. Rimmer & Anor. was an action for malicious prosecution brought by a former police probationer who had been charged and acquitted for theft. The Home Secretary objected to the production of reports. The House of Lords ordered production of the documents for inspection by them, and, after inspection, ordered production to the plaintiff.

Reg. v. Lewes Justices was a case where the objections of the Home Secretary and the Gaming Board to the production of the original and a copy of a letter from the Deputy Chief Constable of Sussex to the Board was upheld. The letter was written in confidence and probably contained information given to the Brighton Police against a promise of confidentiality and the ordinary protection accorded to certain types of information supplied to the police was applied.

Thus in submitting the way that he did the counsel for the defendants came to the conclusion that since our courts are prohibited from inspecting the documents, the court will be debarred from interfering with the decision of the executive when it decides whether certain matters are affairs of State or not.

As I stated earlier I differed with this view. I am of the opinion that it is for the executive to state that the documents are in relation to the affairs of State and it is for the court to decide whether they are indeed the documents as they are claimed to be and to help the court to make its decision by invoking section 162(2) of the Evidence Act.

The principles as laid down by *Conway's* case appearing at page 911 as to production of documents are as follows:—

"When there is a clash between the public interest (1) that harm should not be done to the nation or the public service by the disclosure of certain documents and (2) that the administration of justice should not be frustrated by the withholding of them, their production will not be ordered if the possible injury to the nation or the public service is so grave that no other interest should be allowed to prevail over it, but, where the possible injury is substantially less, the court must balance against each other the two public interests involved."

Sarkar on Evidence, 12th Ed. at page 1170 has this to say:—

"When the Act was enacted 'affairs of State' may have had a comparatively narrow content, e.g. matters of political or administrative character relating to national defence, public peace and security and good neighbourly relations. But the inevitable consequence of the change in the concept of the functions of the State is that the State in pursuit of its welfare activities which were formerly treated as purely commercial and documents in relation to such activities are also apt to relate to the affairs of State. As the Legislature has refrained from defining the term 'affairs of State' it would be inexpedient to attempt to define it. The question as to whether any document answers to the description has to be determined on the relevant facts and circumstances adduced in each case (*S v. Sodhi Sukhdev*, sup. See also *Kotah Match Factory v. S*, A1970 Raj 118; *Sujit v. Union*, A1970 A & N. 131)."

Thus everything boils down to that the question as to whether the document answers to the description has to be determined on the relevant facts and circumstances adduced in each case.

The restriction imposed on the court in the light of section 162(2) of the Evidence Act prohibiting inspection of the documents (unlike in England as de-

cided in *Conway's* case where the court has power to inspect the document and then decide) makes the task of the court more difficult. The court is required to decide whether the document relates to matters of State and at the same time refrain from enquiring into the contents of the document which are the subject matter to be evaluated. Perhaps some trust should be put in the courts, at least in the High Courts, rather than leaving the judge to grope around for the correct decision. Indeed it would be less difficult for all parties if judges here as in England be empowered to inspect the contents first before deciding whether they were affairs of State.

As provided under section 162(2) of the Evidence Act, I have now to take other evidence to enable me to determine the admissibility of the document and I can do this by making an enquiry to ascertain the status of the document in question by calling the Head of Department to give evidence and be examined or to require him to furnish supplementary affidavit or I may decide on the affidavit already affirmed, if I consider it contains sufficient information for me to come to a decision. Page 1164 of *Sarkar on Evidence*, 12th Ed. provides what type of further information that may be sought:—

(a) what injury to the public is apprehended?

(b) what affairs of State are involved in the matter?

I take it that the defendants are not objecting to that part of the inquiry relating solely to the death of the deceased but to other parts containing facts, remarks, opinions and recommendations, all alleged to have been given in strict confidence, and also to that part of the contents which were compiled and furnished for the guidance of the Ministry in formulation of policy relating to medical services and hospital administration. It is not easy for me to state with a certain degree of confidence what injury to the public is apprehended. It is all a matter of speculation which includes erosion of public confidence or perhaps deterring some members of the public to give evidence in future public enquiries. As regards what matter of State is involved I think this is clearly set out in the affidavit. This being the position as deduced by me I do not think I should require any further information from the Head of Department and I shall therefore proceed to decide the matter on the relevant facts and circumstances adduced in the case.

It is to be noted that the main purpose of the enquiry as admitted by counsel for the defence to be set up was to investigate into the death of the deceased and it would appear that other matters were adduced, sought or called in as a result of the said death. Page 1171 of *Sarkar on Evidence*, 12th Edition gives a number of cases coming under the heading of "affairs of State". They cover the case of documents in respect of which the practice of keeping them secret is necessary for the proper functioning of public service. In our instant case it is an isolated enquiry and that there have never been others.

However, it would appear that statements made by witnesses in the course of departmental enquiry into the conduct of public officers who were subsequently put upon their trial on charges of taking illegal

A gratification are not privileged; but statements by witnesses in a secret and confidential investigation by the CID for ascertaining whether there is a *prima facie* case for departmental enquiry against a public servant, are privileged. Departmental enquiry by Railway Administration as to a fire in a truck at a wayside station with a view to litigation which might arise is privileged.

B The important part of the position of the law on this aspect as disclosed by *Sarkar* is at the last paragraph of page 1171 which reads as follows:—

"Departmental enquiry papers are not unpublished documents relating to affairs of State. Consequently where the probity of the conduct of a public servant is a matter in issue the State cannot screen his conduct from the purview of the court (*Niranjan v. S*, A1968 Pu 255)."

C In the *Niranjan's* case the document sought to be produced was a departmental enquiry instituted against one Jaswant Singh on several charges including one of corruption and in consequence thereof he was suspended from service.

D As I stated earlier the jeopardy in disclosing the document will be a matter of speculation. This is not a document relating to Military or international affairs, or acts of pending international negotiations or military negotiations where there can be no two opinions that such document should be privileged.

E In *Robinson v. State of South Australia*⁽⁶⁾ privilege was claimed for communications between certain departmental officers on the ground that disclosure would be contrary to the interests of the State. The principle that was laid in this case is as follows:

F "A claim to protection in the case of documents relating to the trading, commercial or contractual activities of a State can rarely be sustained, especially in time of peace. That documents would prejudice the case of the State in the litigation, or assist the other party, is a compelling reason for their production only to be overborne by the gravest reasons of State policy or security."

Lord Blanesburgh on page 714 had this to say:—

"Its foundation is that the information cannot be disclosed without injury to the public interests and not that the documents are confidential or official, which alone is no reason for their non-production."

G Counsel for the plaintiffs submitted that the documents do not relate to affairs of State and that public interest and administration of justice require the documents to be produced and that there is no evidence that the Ministry of Health will suffer and pleaded that the withholding of the documents will suggest something sinister. He quoted *Woodroffe & Ameer Ali's Law of Evidence*, 13th Ed. 1975 at page 3069 which reads as follows:—

H "The privilege conferred by this section is a narrow one and most sparingly to be exercised. 'The principle of the rule,' Taylor points out in his work on Evidence, section 939, 'is concern for public interest and the rule will accordingly be applied no further than the attainment of that object requires'."

I At the foot of the same page and of the same book, it reads as follows:—

"Neither would it be a good ground that production might tend to expose a want of efficiency in the administration or tend to lay the department open to claims for compensation. It is not enough that the Minister or the department does not want to have the document produced. The Minister, in deciding whether it is his duty to object, should bear these considerations in mind, for he ought not to take the responsibility of withholding production, except in cases where the

public interest would otherwise be damnified, e.g., where disclosure would be injurious to national defence, or to good diplomatic relations, or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service" (the emphasis is mine).

In the instant case there is no claim by the defendants that it is the practice of holding the enquiry and the documents are not claimed as class document. Counsel for the plaintiffs also referred to page 3075 of *Woodroffe* which reads as follows:—

"Departmental inquiry papers are not unpublished documents relating to affairs of State. When the probity of the conduct of a public servant is in issue, the State cannot screen his conduct on the ground that it is an 'affair of State' and is therefore sacrosanct."

From the affidavit of the Deputy Secretary-General of the Ministry of Health after applying the principles of law as I understand them to be, I am not satisfied that the notes and findings of the Committee are affairs of State. They do not fall into the class of documents for instance police information or military secrets or concerning diplomatic relations. On the contrary the enquiry was instituted into the death of the deceased which is the subject matter of this Civil Suit and other matters, for instance, statements, remarks, or opinions must necessarily flow from the enquiry of the death of the deceased. The confidentiality as alleged is not specific, as in the case of police information where there was promise of confidentiality given to the informers otherwise no such information is obtainable in the future which is therefore disastrous for the State in its work for crime detection. In the instant case, it cannot be implied what information that was submitted to the Ministry of Health that needs protection from disclosure.

In the circumstances, I shall disallow the objection of the counsel for the defence and shall permit the admission of the reports and findings of the Committee of Enquiry. Costs of this application shall be in the cause.

From the above judgment the defendants appealed to the Federal Court. In the Federal Court the following judgment was delivered:

Raja Azlan Shah F.J.: This is an appeal by the defendants in Civil Suit No. 10 of 1974 from the decision of the learned judge of the High Court at Raub on a preliminary issue in the matter of Notice to Produce dated December 2, 1976 all the documents in respect of a Committee of Enquiry held into the death of one Siminder Singh s/o Lall Singh disallowing objection by appellants' counsel and ordering production of the reports and findings of the Committee of Enquiry.

In Civil Suit No. 10 of 1974 the estate of the deceased is claiming damages for his death as a result of the alleged negligence of the medical officers of Bentong and Mentakab District Hospitals where the latter was admitted and treated as a patient as a result of a motor car accident along the Karak/Kuantan main trunk road. The Government is brought in as their employer.

As in the court below, it was urged before us that section 123 of the Evidence Act is applicable and the documents are privileged from disclosure. Section 123 reads:—

A "123. No one shall be permitted to produce any unpublished official records relating to affairs of State, or to give any evidence derived therefrom, except with the permission of the officer at the head of the department concerned, who shall give or withhold permission as he thinks fit, subject, however, to the control of a Minister in the case of a department of the Federal Government, and of the Chief Minister in the case of a department of a State Government."

B It is contended that the learned judge erred both in fact and law in holding that the notes and findings of the Committee of Enquiry were not unpublished official records relating to affairs of State in terms of section 123 of the Evidence Act.

C Prior to *Conway v. Rimmer*⁽¹⁾ the position in England was that the court could not go behind the Minister's certificate that disclosure of a class of documents or the contents of particular documents would be injurious to the public interest. His certificate was conclusive. That was decided in the celebrated case of *Duncan v. Cammell, Laird & Co. Ltd.*⁽²⁾ which was followed in *Ellis v. Home Office*.⁽³⁾ In *Conway v. Rimmer, supra*, the House of Lords held that the wide interpretation of *Duncan v. Cammell, Laird & Co. Ltd., supra*, was wrong and that the court could go behind a Minister's certificate claiming privilege and examine the documents in question (without their being shown to the parties) and decide whether or not the decision was justified. This judgment has now been put into statutory form viz. the Administration of Justice Act, 1970, enabling a court to order disclosure of documents, etc., applying specifically to the Crown, except that no such order may be made if the court considers "that compliance with the order, if made, would be likely to be injurious to the public interest". Thus the law in England has been brought into line with the law of the United States and other Commonwealth countries. In the United States the courts have consistently refused to recognise any absolute power in the executive to forbid disclosure of evidence. In the leading case of *United States v. Reynolds*,⁽⁴⁾ several civilian observers aboard a military plane on a flight to test secret electronic equipment were killed when the said plane crashed and their widows sued the Government. The plaintiffs applied for discovery of the accident investigation report but the Government claimed privilege and refused to produce the report. The court rejected the view that the assertion of executive privilege was conclusive on the question of production. The court recognised that there are State secrets which need not be produced but held that the determination of whether they are State secrets is a judicial function and only when it is satisfied that compulsion of the evidence will expose military matters which, in the interest of national security, shall not be divulged, will it refuse to require disclosure. The refusal of the United States courts to allow the claim to executive privilege received striking confirmation in the case of *New York Times Co. v. United States*⁽⁵⁾ — popularly known as the Pentagon Paper case. In that case the Supreme Court refused an injunction sought by the Government to restrain the New York Times and Washington Post from publishing the contents of a classified study entitled 'History of U.S. Decision-Making Process on Vietnam Policy' prepared within the Defence Department.

In Australia, the courts had decided, long before *Conway v. Rimmer*, *supra*, that an affidavit of the Minister was not conclusive and that the court had power to call for the documents, examine them, and determine the validity of the claim for themselves. The decision of the Privy Council in *Robinson v. South Australia*⁽⁶⁾ was to this effect. The courts of Victoria and New South Wales had held that they had a residual power to override the executive's claim to privilege except in relation to defence and matters of State: see *Bruce v. Waldron*,⁽⁷⁾ and *Ex parte Brown; Re Tunstall*.⁽⁸⁾

In New Zealand in the case of *Corbett v. Social Security Commission*⁽⁹⁾ the courts refused to follow *Duncan v. Cammell, Laird & Co. Ltd.*, *supra*, preferring instead the earlier advice of the Privy Council in *Robinson v. South Australia*, *supra*.

It can be seen that there has never been an American counterpart of *Duncan v. Cammell, Laird* and in all the three Commonwealth jurisdictions *Duncan v. Cammell, Laird* had been given the *coup de grace* and judges are free to adopt the practice by inspecting the documents when the Minister's certificate is not sufficient information to enable them to say that privilege applies and it is necessary to decide the issue on the balance of competing considerations.

In India, as in Malaysia, the law on the subject is contained in sections 123 and 162 of the Evidence Act. In the former, the controversy has centred upon the last phrase in section 162 and the extent to which the court can take evidence of the contents of the documents. Courts in India tend to rely on the wording of the Evidence Act rather than English law: see *Sarkar on Evidence* (1971 Ed.) 1161-1175. The Indian Supreme Court first considered the matter in *Union of India v. Sodhi Sukhdev Singh*⁽¹⁰⁾ which has been followed by all Indian courts including the Supreme Court but in a notable Punjab case, i.e., *Niranjan Dass v. State of Punjab*⁽¹¹⁾ the High Court took a common sense view of the problem and refused to allow the claim for privilege to camouflage official misconduct. In *Sukhdev's* case the court delivered three judgments. Gajendragadkar J. (for Sinha C.J. and Wanchoo J.) opined that the courts had power to enquire whether the documents were official or not and take evidence to that effect. Kapur J. followed the traditional English view and denied the right to take evidence. Subba Rao J. took the view that the only limitation on the court was that they could not inspect the documents or allow the parties to adduce secondary evidence of their contents. What makes these opinions interesting is that all the judges rely on English law and the common law. All of them seemed to regard the problem before them as if they were looking at an English law problem in the abstract. In 1975 the Supreme Court clarified the law relating to executive privilege. In the *State of Uttar Pradesh v. Raj Narain*⁽¹²⁾ the Supreme Court took the following stand:

"The foundation of the law behind sections 123 and 162 of the Evidence Act is the same as in English law. It is that injury to public interest is the reason for the exclusion from disclosure of documents whose contents if disclosed would injure public and national interest. Public interest which demands that evidence be withheld is to be weighed against the

A public interest in the administration of justice that courts should have the fullest possible access to all relevant materials. When public interest outweighs the latter, the evidence cannot be admitted. The court will *proprio motu* exclude evidence the production of which is contrary to public interest. It is in public interest that confidentiality shall be safeguarded. The reason is that such documents become subject to privilege by reason of their contents. Confidentiality is not a head of privilege. It is a consideration to bear in mind. It is not that the contents contain material which it would be damaging to the national interest to divulge but rather that the documents would be of class which demand protection. To illustrate the class of documents would embrace Cabinet papers, Foreign Office dispatches, papers regarding the security of the State and high level inter-departmental minutes. In the ultimate analysis the contents of the documents are so described that it could be seen at once that in the public interest the documents are to be withheld."

C The high-water mark of *Raj Narain's*, *supra*, case is the clear acceptance of the principle by the court that affidavit evidence claiming privilege is not conclusive and the court has power to inspect the document to satisfy itself that it requires protection. Secondly, a claim to privilege cannot be rejected merely on the ground that no affidavit was filed or that it was defective. Where no affidavit was filed, an affidavit could be filed later; if an affidavit was defective, an opportunity could be directed to file a better affidavit. In any case, the question of privilege is one for judicial resolution.

E In this country, objection as to production as well as admissibility contemplated in sections 123 and 162 of the Evidence Act is decided by the court in an enquiry of all available evidence. This is because the court understands better than all others the process of balancing competing considerations. It has power to call for the documents, examine them, and determine for itself the validity of the claim. Unless the court is satisfied that there exists a valid basis for assertion of the privilege, the evidence must be produced. This strikes a legitimate balance between the public and private interest. Where there is a danger that disclosure will divulge, say, State secrets in military and international affairs or Cabinet documents, or departmental policy documents, private interest must give way. It is for the court, not the executive, ultimately to determine that there is a real basis for the claim that "affairs of State is involved", before it permits non-disclosure. While it is clear that the final decision in all circumstances rests with the court, and that the court is entitled to look at the evidence before reaching a concluded view, it can be expected that categories of information will develop from time to time. It is for that reason that the legislature has refrained from defining "affairs of State." In my opinion, "affairs of State", like an elephant, is perhaps easier to recognise than to define, and their existence must depend on the particular facts of each case.

I I am of the view that the learned judge adopted the right and proper approach in the instant case by scrutinizing the affidavit of the Deputy Secretary-General of the Ministry of Health sworn to on December 14, 1976, more than 1½ years after issue of the Writ of Summons. As the learned judge said:—

"As provided under section 162(2) of the Evidence Act, I have now to take other evidence to enable me to determine the admissibility of the document and I can do this by making an enquiry to ascertain the status of the document in question by calling the Head of Department to give evidence

and be examined or to require him to furnish supplementary affidavit or I may decide on the affidavit already affirmed, if I consider it contains sufficient information for me to come to a decision. Page 1164 of *Sarkar on Evidence*, 12th Ed. provides what type of further information that may be sought:—

(a) what injury to the public is apprehended?

(b) what affairs of State are involved in the matter?

I take it that the defendants are not objecting to that part of the inquiry relating solely to the death of the deceased but to other parts containing facts, remarks, opinions and recommendations, all alleged to have been given in strict confidence, and also to that part of the contents which were compiled and furnished for the guidance of the Ministry in formulation of policy relating to medical services and hospital administration. It is not easy for me to state with a certain degree of confidence what injury to the public is apprehended. ... As regards what matter of State is involved I think this is clearly set out in the affidavit. This being the position as deduced by me I do not think I should require any further information from the Head of Department and I shall therefore proceed to decide the matter on the relevant facts and circumstances adduced in the case."

A mere assertion of confidentiality and that affairs of State are involved without evidence in support cannot, in my view, shut out the evidence sought by the respondents. Paragraph 2 admitted that the Committee was set up by the Ministry to inquire into the death of the deceased at the Hospital Daerah Mentakab on June 1, 1973. The terms of Reference or any document relating thereto were not before the court. The affidavit went on in paragraph 3 to broaden the base by asserting that the inquiry was "to investigate into matters relating to the medical facilities and services and hospital administration existing in the Hospital Daerah Mentakab in 1973 with a view to make such comments and recommendations ... to enable my Ministry to carry out its policy of promoting greater efficiency in hospital administration and the provision of medical services not only in respect of the Hospital Daerah Mentakab but also in respect of all hospitals throughout the country." I am of opinion that this was uttered with tongue in cheek and with no other object than to suppress evidence which may or may not assist the respondents in their claim based on negligence of the appellants medical officers and the Government as their employer.

Ground 2 of the Memorandum of Appeal claimed disclosure would be in "breach of the pledge by the Ministry that all facts, remarks, opinions and recommendations of witness and members of the Committee was to be given in strict confidence." I see no substance in this contention, regard it as entirely capacious, and reject it by saying that there is no evidence of such pledge. I feel that the only reason for the claim is generalities about candour within the public service with the sole object of gaining an unfair advantage over the respondents' case. I may also point out that confidentiality is not a separate head of privilege, but may be a material consideration to bear in mind in determining whether the public interest falls on the side of disclosure or non-disclosure. "The fact that information has been communicated by one person to another in confidence is not a sufficient ground for protecting from disclosure in a court of law the nature of the information if it would assist the court to ascertain facts which are relevant to an issue on which it is adjudicating." (See *D. v. National Society for the Prevention of Cruelty to Children*).⁽¹³⁾

A The need to preserve freedom and candour of communication with and within the public service has been a favourite argument but once this unsound argument is allowed to run riot, free rein would be given to the tendency to secrecy which is inherent in the public service. Freedom and candour of communication is not a factor in itself that will persuade the court to order that information be not disclosed, and that line of argument was scorned by the House of Lords in *Conway v. Rimmer*, *supra*. The approach taken was that the number of instances of revelation in judicial proceedings is infinitesimal when compared with the number of occasions on which it is necessary for public servants to express their views. Further, it would be belittling them to suggest that their advice would vary according to whether or not it was exposed to public scrutiny. I do not think public servants would shrink from giving honest opinions just because there is a distant chance that their report may one day have to be disclosed in open court. As Lord Radcliffe said in *Glasgow Corporation v. Central Land Board*:⁽¹⁴⁾ "I should myself have supposed Crown servants to be made of sterner stuff", and he criticised the insidious tendency to suppress "everything however commonplace that has passed between one civil servant and another behind the departmental screen."

The documents of the said Committee of Enquiry consist of a report dated October 3, 1973 compiled by the said Committee and notes of evidence. These departmental documents are not unpublished documents relating to affairs of State. Consequently where the Government or the doctor is sued for negligence the Government cannot screen the alleged wrongful act from the purview of the court on the ground that it is an affair of State demanding protection. In the administration of justice nothing is of higher importance than that all relevant evidence should be admissible and should be heard by the tribunal that is charged with deciding according to the truth. To ordain that a court should decide upon the relevant facts and at the same time that it should not hear some of those relevant facts from the person who best knows them and can prove them at first hand, seems to be a contradiction in terms. It is best that truth should be out and that truth should prevail.

The appeal is dismissed with costs.

Gill C.J. (Malaya) and Ong Hock Sim F.J. concurred.

Appeal dismissed.

Solicitors: Kean Chye & Sivalingam.